MOTION FILED
NOV 12 1991

No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

MOTION OF BASIN ELECTRIC POWER COOPERATIVE FOR LEAVE TO FILE MEMORANDUM IN OPPOSITION TO NEBRASKA'S MOTION FOR LEAVE TO FILE AMENDED PETITION AND PROPOSED MEMORANDUM

EDWARD WEINBERG
Counsel of Record
RICHMOND F. ALLAN
DUNCAN, WEINBERG, MILLER & PEMBROKE, P.C.
1615 M Street, N.W.
Suite 800
Washington, DC 20036
(202) 467-6370

MICHAEL J. HINMAN
General Counsel
BASIN ELECTRIC POWER COOPERATIVE
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

Of Counsel:

CLAIRE OLSON
Assistant General Counsel
BASIN ELECTRIC POWER COOPERATIVE
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

November 12, 1991

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 108, Original

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

MOTION OF BASIN ELECTRIC POWER COOPERATIVE FOR LEAVE TO FILE MEMORANDUM IN OPPOSITION TO NEBRASKA'S MOTION FOR LEAVE TO FILE AMENDED PETITION

Basin Electric Power Cooperative (Basin) moves for leave to file the accompanying Memorandum in Opposition to Nebraska's Motion for Leave to File Amended Petition. In support of its motion Basin states:

1. Basin is the operator and, with five other consumer owned electric utilities, the owner of the Missouri Basin Power Project (MBPP), the facilities of which include the Grayrocks Dam and Reservoir located on the Laramie River in Wyoming about 10

miles above its confluence with the North Platte River.[1]

2. Two of the four violations alleged by Nebraska in the petition that the Court granted her leave to file on January 20, 1987, are that Wyoming is:

> a. Depleting the flows of the North Platte River by the operation of Greyrocks [sic] Reservoir on the Laramie River, a tributary of the North Platte River.
>
> b. Depleting the flows of the North Platte River by the proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte rivers.

Each of those allegations directly involves Basin because Basin is an owner and the operator of Grayrocks Dam and Reservoir and because the proposed development referred to in paragraph b is the Corn Creek irrigation project, the Laramie River water

[1] The other participants in the MBPP are Tri-State Generation and Transmission Cooperative; the Lincoln Electric System, operated by the City of Lincoln, Nebraska; the Western Minnesota Municipal Power Agency; Heartland Consumer Power District; and the Wyoming Municipal Power Agency. The MBPP participants and their member distribution systems serve more than 1,200,000 people in Colorado, Iowa, Minnesota, Montana, Nebraska, North Dakota, South Dakota and Wyoming. Grayrocks Dam and Reservoir provide cooling water for MBPP's Laramie River Station, a 1500 megawatt thermal electric generating plant. The MBPP is one of the major power suppliers in the region of the northern and central great plains and its transmission system is interconnected with all the major utility systems, public and private, that serve or connect in the eight state area served by MBPP's member systems.

supply for which will be stored in and released from Grayrocks Reservoir, if the project is ever built.

3. Basin Electric is an *amicus curiae* in the proceedings before Special Master Olpin, to whom the Court referred Nebraska's petition and five then pending petitions to intervene, including that of Basin. In granting Basin the right to participate as an *amicus*, Special Master Olpin observed that "Basin Electric's participation here as an *amicus* will serve both to ensure that Wyoming adequately protects Basin Electric's substantial interests, and to fully flesh out the necessary data for the Court." Seventh Memorandum of Special Master, 11 (April 1, 1988). Basin has since participated fully in the proceedings before the special master, including the briefing and argument of the motions for summary judgment now awaiting his action.

4. Basin was granted leave by the Court to file a response in opposition to Nebraska's first motion to amend her petition. Order of March 7, 1988, 485 U.S. 931.

Respectfully submitted,

EDWARD WEINBERG
Counsel of Record
RICHMOND F. ALLAN
DUNCAN, WEINBERG, MILLER & PEMBROKE, P.C.
1615 M Street, N.W.
Suite 800
Washington, DC 20036
(202) 467-6370

MICHAEL J. HINMAN
General Counsel
BASIN ELECTRIC POWER COOPERATIVE
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

Of Counsel:

CLAIRE OLSON
Assistant General Counsel
BASIN ELECTRIC POWER COOPERATIVE
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

November 12, 1991

No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

BASIN ELECTRIC POWER COOPERATIVE'S MEMORANDUM IN OPPOSITION TO NEBRASKA'S MOTION FOR LEAVE TO FILE AMENDED PETITION

EDWARD WEINBERG
Counsel of Record
RICHMOND F. ALLAN
DUNCAN, WEINBERG, MILLER & PEMBROKE, P.C.
1615 M Street, N.W.
Suite 800
Washington, DC 20036
(202) 467-6370

MICHAEL J. HINMAN
General Counsel
BASIN ELECTRIC POWER COOPERATIVE
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

Of Counsel:

CLAIRE OLSON
Assistant General Counsel
BASIN ELECTRIC POWER COOPERATIVE
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

November 12, 1991

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT	1
ARGUMENT	
1. There Is No Unapportioned Natural Flow Water Above Tri-State	6
2. Nebraska Has Shown No Such Injury or Damage As Would Warrant the Court To Alter the Existing Apportionment	7
3. The Issues Posed by the Case As It Is Must Be Resolved Before Consideration Is Given To Allowing the Litigation of Others	17
CONCLUSION	20

TABLE OF AUTHORITIES

CASES:	Page
Alabama v. Arizona, 291 U.S. 286 (1934)	5
Colorado v. Kansas, 320 U.S. 383 (1943)	5
Colorado v. New Mexico, 459 U.S. 176 (1982)	5
Connecticut v. Massachusetts, 282 U.S. 660 (1931)	5
Dooley v. Penland, 300 S.W. 9 (Tenn. 1927)	13
Idaho v. Oregon, 462 U.S. 1017 (1983)	5
Jess v. West, Civ. No. 88-L-308 (D. Neb.)	10
Missouri v. Illinois, 200 U.S. 496 (1906)	5
Nebraska v. REA, 12 Env't Rep. Cas. (BNA) 1156 (D. Neb. 1978), *judgment vacated and appeal dismissed*, 594 F.2d 870 (8th Cir. 1979)	14
Nebraska v. Wyoming, 325 U.S. 589 (1945), *modified and supplemented*, 345 U.S. 981 (1953)	*passim*
Orders:	
Jan. 20, 1987, 479 U.S. 1071	3
Mar. 7, 1988, 485 U.S. 931	3
New York v. New Jersey, 256 U.S. 296 (1921)	5
North Dakota v. Minnesota, 263 U.S. 365 (1923)	5
Ohio v. Kentucky, 410 U.S. 641 (1973)	19
Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC, 876 F.2d 109 (D.C. Cir. 1989)	8
Washington v. Oregon, 297 U.S. 517 (1936)	5
Wyoming v. Colorado, 259 U.S. 419 (1922), *modified*, 260 U S. 1 (1922), *decree vacated and replaced*, 353 U.S. 953 (1957)	11,12

Table of Authorities Continued

	Page
STATUTES:	
Endangered Species Act, 16 U.S.C. § 1536(e)-(p)	15
MISCELLANEOUS:	
A. D. Tarlock, *Law of Water Rights and Resources* (Clark Boardman Co. 1990)	14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 108, Original

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

BASIN ELECTRIC POWER COOPERATIVE'S MEMORANDUM IN OPPOSITION TO NEBRASKA'S MOTION FOR LEAVE TO FILE AMENDED PETITION

Statement

Nebraska sought leave in 1986 to file this action to enforce the decree entered herein in 1945, as modified and supplemented in 1953. *Nebraska v. Wyoming*, 325 U.S. 589, 665; 345 U.S. 981. In the petition she then proposed for filing Nebraska alleged that Wyoming was violating the decree by:

> a. Depleting the flows of the North Platte River by the operation of Greyrocks [sic] Reservoir on the Laramie River, a tributary of the North Platte River;
>
> b. Depleting the flows of the North Platte River by the proposed construction of additional river pumping, diversion, and storage

facilities at the confluence of the Laramie and the North Platte rivers;

c. Depleting the natural flows of the North Platte River by the proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir; and

d. Actions by state officials to prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska.[1]

Wyoming opposed the filing on the ground, among other, that Nebraska had made no such showing of injury as is required to invoke the original jurisdiction of the Court in an action between states.

Replying to Wyoming's opposition, Nebraska assured the Court that she sought only to enforce the decree as it stands and not to modify it in any way. She said:

> Each of Nebraska's allegations involves present or threatened interference with its apportionment established by the Court in this case. Nebraska does not seek to modify the Decree in any respect, but only to enforce it pursuant to the Court's express anticipation of the need to do so. We do not propose to litigate anything new, but simply to protect what the Court has already decided. In short, we are asking the Court to protect the integrity of its Decree pursuant to its express and specific retention of jurisdiction.[2]

[1] Neb's Petition for Order Enforcing Decree, 2 (Oct. 6, 1986).

The Court then granted Nebraska leave to file her petition to enforce the decree by order of January 20, 1987. 479 U.S. 1071.

Notwithstanding her representation to the Court, made to avoid Wyoming's contention that she had made no such showing of injury as would move the Court to consider modifying the decree, Nebraska subsequently sought leave to amend her petition to seek such modification to augment her apportionment. The Court denied this motion by order of March 7, 1988. 485 U.S. 931.

Nebraska asserts that her previous motion to amend bears no relation to her instant motion to do so. Neb's Brief, 5 (Oct. 9, 1991). She says:

> This amended petition is quite different from the one filed in 1988. The 1988 amended petition sought relief for fish and wildlife interests during the irrigation season. It asked the Court to construe or modify the Decree to consider post-Decree developments. By contrast, the present motion presents a classic equitable apportionment of the previously unapportioned, non-irrigation season flows. All equities in Nebraska and Wyoming will be considered and equitably balanced in relation to one another. The Court only partially apportioned non-irrigation season flows in the original litigation.

[2] Neb's Reply to Wyo's Brief in Opposition, 2 (Jan. 14, 1987).

Id. at 37.

But however cast, it is clear that Nebraska is seeking by her instant motion to obtain exactly the same thing as she sought by her earlier motion, *i.e.*, to increase her apportionment of the natural flow of the North Platte originating above Tri-State Dam for use below.[3] Basin submits that Nebraska's instant motion should be denied as was her earlier one. She has made no showing of such real and substantial injury as is required to plead a case for an apportionment or modification of an existing apportionment of an interstate stream.[4]

---

[3] Tri-State Dam is the division point employed in the decree. It is located in Nebraska approximately one mile east and downstream of the Wyoming-Nebraska line. The decree apportions the natural flow in the segment of the river between Guernsey (or Whelan) and Tri-State between Wyoming and Nebraska. Decree ¶ V, 325 U.S. at 667-68.

The decree apportions no water to Nebraska for diversion below Tri-State Dam. Yet, except in relation to her claim involving the Inland Lakes, Nebraska does not contend that Wyoming has interfered in any way with the diversions Nebraska is entitled to make into the canals headed at or above Tri-State or with her use of the natural flow so diverted. Rather, she contends that she has developed "equities" below Tri-State since 1945 that entitle her, under the decree as it stands, to receive, below Tri-State during the irrigation season, natural flow water originating above Tri-State for in-stream use, including storage in Lake McConaughy, and for downstream diversion for irrigation and other purposes. These claims are among those now pending for determination by the special master on motions for summary judgment.

[4] The burden on a state that seeks to invoke the Court's original or retained jurisdiction to obtain an apportionment or to alter an existing apportionment is different in kind and substantially greater, both as a matter of pleading and proof, than

In the original proceedings in this case, Nebraska initially contended that her apportionment should provide for uses of water in Nebraska down to Grand Island, 325 U.S. at 607, about 300 miles east of Tri-State Dam and the Wyoming-Nebraska line. She abandoned this claim before the decree was entered but continued to assert that her apportionment should provide for uses of water in Nebraska down to Bridgeport, located about 60 miles downstream from Tri-State and the state line. *Id.*

Master Doherty concluded that Nebraska had no equities to warrant her being apportioned any part

---

the burden on a state that seeks only to enforce an existing decree. The Court has said that a state seeking to sue another "must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor," *Alabama v. Arizona*, 291 U.S. 286, 291-92 (1934), and that "[a] state seeking equitable apportionment must prove by clear and convincing evidence some real and substantial injury or damage." *Idaho v. Oregon*, 462 U.S. 1017, 1027 (1983).

> Not every matter which would warrant resort to equity by one citizen against another [warrants the Court's] interference with the action of a state, for the burden on the complaining state is much greater than that generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and clearly proved.

Colorado v. Kansas, 320 U.S. 383, 393 (1943). *See also Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982); *Washington v. Oregon*, 297 U.S. 517, 522 (1936); *Connecticut v. Massachusetts*, 282 U.S. 660, 669, 672 (1931); *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923); *New York v. New Jersey*, 256 U.S. 296, 309 (1921); *Missouri v. Illinois*, 200 U.S. 496, 520 (1906).

of the natural flow of the river originating above Tri-State Dam for use below that point, except such as she should be entitled to divert into specified canals headed at or above Tri-State (in the stretch of the river from Guernsey [or Whelan] to Tri-State) for the irrigation of specified quantities of land under the canals in Nebraska. The Court, over Nebraska's exceptions, confirmed the master's conclusion, saying:

> We think, as we will develop later, that the record sustains the conclusion that equitable apportionment does not permit Nebraska to demand direct flow water from above Whelan for use below Tri-State.

325 U.S. at 628.

Argument

1. There Is No Unapportioned Natural Flow Water Above Tri-State

The major premise of Nebraska's instant motion for leave to amend her petition, that the existing decree does not apportion all of the natural flow of the river originating above Tri-State, is patently fallacious. The decree expressly apportions all of the natural flow of the river originating above Tri-State among Colorado, Wyoming, and Nebraska. It leaves none of the natural flow unapportioned during either the irrigation or non-irrigation season.

Nebraska acknowledges that the decree deals with non-irrigation season (October 1 through April 30, inclusive) flow in a number of respects, including making provision for her to store 46,000 acre feet of such flow in her Inland Lakes during the months of October, November and April. Neb's proposed amended

petition, 2-3 (Oct. 9, 1991). Nevertheless, she would have it that the decree effects less than a total apportionment of such flow because her apportionment of the natural flow originating above Tri-State is, except as noted above, restricted to the irrigation season (May 1 through September 30, inclusive). This is a *non sequitur* of generous proportions. In plain terms the decree apportions all of the natural flow ("all water in the stream except storage water," 325 U.S. at 670) originating above Tri-State among Colorado, Wyoming and Nebraska. An imperative of the very structure of the decree is that all natural flow water originating above Tri-State that is apportioned neither to Colorado nor to Nebraska is apportioned to Wyoming.

What Nebraska seeks by her proposed amended petition is not unapportioned water but water within Wyoming' apportionment under the existing decree. No one questions the power of the Court, where it believes the exercise of such power appropriate, to alter an apportionment previously made to accommodate changed conditions. What Basin finds objectionable about Nebraska's new motion for leave to amend her petition is its disingenuousness; its undertaking to mask the fact that she is seeking a reapportionment behind a phantasm of the existence of "unapportioned" water.

2. Nebraska Has Shown No Such Injury or Damage As Would Warrant the Court To Alter the Existing Apportionment

Stripped of the robes of obfuscation in which she dresses it, Nebraska's proposition is that the apportionment of the natural flow originating above Tri-State effected by the decree should be revised to

increase her allocation and reduce Wyoming's. She contends that, since the entry of the decree, she has actually received more water than is apportioned to her; that she has found uses for such water from which "equities" have sprung up; and that these equities should now be accommodated by altering the current apportionment. These contentions are precisely the same as those on which she predicates her claim in this case as it stands that the existing decree apportions her water, including Laramie water, for diversion and use below Tri-State during the irrigation season.

What is driving Nebraska's present efforts to wrest water from Wyoming are proceedings before the Federal Energy Regulatory Commission involving the relicensing of power and irrigation in projects in Nebraska located about 200 miles downstream from Wyoming and Tri-State. Neb's Brief, 34-35 (Oct. 9, 1991). Nebraska anticipates that, as a condition of relicensing, these projects are going to be required to make more water available for the protection of wildlife, particularly for the protection of habitat in the Big Bend area of the Platte River located below its confluence with the North Platte. *See Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109 (D.C. Cir. 1989). She fears that the modes of operation that will be prescribed for these projects will diminish their value for power and irrigation, Neb's Brief, 34-35 (Oct. 9, 1991), and seeks to compel Wyoming to make up the anticipated deficit from the share of the natural flow of the North Platte now apportioned to Wyoming. As Nebraska says, the purpose of her previous motion for leave to amend her petition, which the Court denied, was "to

spread the burden of protecting critical wildlife habitat throughout the North Platte Basin." Neb's Brief, 37 (Oct. 9, 1991).[5]

This is still her purpose. She aims to shift the anticipated burden, on irrigation and power generation in central Nebraska, of enhancing the protection of wildlife on the Platte River by securing a reduction of Wyoming's apportionment of the natural flow of the North Platte originating above Tri-State Dam. She asks the Court to reapportion to her substantially all of the water within Wyoming's existing apportionment that Wyoming has not consumed and that she has received as a windfall since the decree was entered. She variously contends that this windfall constitutes a "regimen of the river," or a "predicate of the decree," that is, in the case of irrigation season flows, comprehended within her existing apportionment and that should, in the case of non-irrigation season flows, now be settled on her by reapportionment.

With the exception of the Missouri Basin Power Project (Grayrocks) operated by Basin on the Laramie River, she does not contend that Wyoming has actually done anything that has interfered with the passage to her of natural flow water within Wyoming's apportionment. She says that "[t]hrough formal discovery [she] has become aware of numerous water development projects in Wyoming" that threaten her "downstream equities." Neb's Brief, 20-21.[6] As Wy-

---

[5] Even this is disingenuous, since the habitat principally involved is located in the Platte River Basin about 300 miles east of Tri-State, rather than in the North Platte River Basin.

[6] Among the projects she represents she became aware of

oming has demonstrated by uncontroverted evidence, *see* n.14 *infra*, none of these projects has resulted or threatens to result in any significant change in, to borrow the shibboleth so favored by Nebraska, "the regimen of the river."

What extensive discovery, briefing and argument has revealed is that there is only one project currently under active development in Wyoming that arguably might diminish the quantity of natural flow water passing into Nebraska and constitute a violation of Nebraska's rights under the decree. This is the Deer Creek project under development on a tributary entering the North Platte below Pathfinder Dam to supply municipal water to Casper, Wyoming. The issues relating to this project will be resolved in this case as presently structured, *i.e.*, as an action to enforce the decree. It will be determined in this case as it is whether the construction and operation of the Deer Creek project would violate any rights of Nebraska under the existing decree. That is, whether it would reduce the natural flow of the North Platte in the Guernsey to Tri-State section below the amounts specified and limited in paragraph IV of the decree, which Nebraska is entitled to divert into the five specified canals for the benefit of the lands served by them in Nebraska.

If it is finally determined that the operation of the project would result in an invasion of Nebraska's

"through formal discovery" are the Deer Creek Project, which she has been monitoring and hectoring for many years and which she is challenging in separate litigation (*Jess v. West*, Civ. No. 88-L-308 [D. Neb.]), and the Corn Creek Project, which is a subject of the settlement agreement she entered into with Basin and others relative to the Missouri Basin Power Project (Grayrocks) in 1978.

rights under the decree, its construction will be enjoined or Wyoming will be required to compensate for its consumptive use of water in some other way. If, on the other hand, it is finally determined that the operation of the project would result in no violation of Nebraska's rights (*e.g.*, because the project is determined to be for domestic or municipal purposes within the exemption provided by paragraph X of the decree or because it will not diminish natural flow in the Guernsey to Tri-State section of the river below the amount necessary to satisfy the entitlement of the Nebraska lands specified in paragraph IV of the decree), Nebraska will have no cause for complaint.

Other threats to maintenance of the "regimen of the river" perceived by Nebraska are: 1) Wyoming's adherence to the position that the water of the Laramie River is completely apportioned between Colorado and her by the decree in *Wyoming v. Colorado*, 259 U.S. 419 (1922), *modified*, 260 U.S. 1 (1922), *decree vacated and replaced*, 353 U.S. 953 (1957), that this is confirmed by the decree in this case, and that Nebraska is not entitled to any Laramie water, except such as actually reaches the North Platte and thereby becomes subject to apportionment in accordance with ¶ V of the decree herein;[7] 2) the proposed Corn Creek Project on the Laramie near its mouth;[8] 3) the refurbishment of Tri-State Dam resulting in the stop-

[7] Neb's proposed amended petition, 8 ¶ 27; Neb's Brief, 24-25 (Oct. 9, 1991).

[8] Neb's proposed amended petition, 9 ¶ 28; Neb's Brief, 24 (Oct. 9, 1991).

page of leakage through it of some 81,700 acre feet of water annually.[9]

Basin submits that Wyoming must be excused for holding fast to the position that the Laramie is completely apportioned between Colorado and her and that this is recognized and confirmed by the decree in this case.[10] Nevertheless, Wyoming is not "threat-

---

[9] Neb's proposed amended petition, 10 ¶¶ 34-36; Neb's Brief, 11 (Oct. 9, 1991).

[10] A great deal of plain language in both this case and *Wyoming v. Colorado* would have to be turned upside-down to conclude that Nebraska has any entitlement to water in the Laramie that does not actually reach the North Platte.

The current and only operative decree in *Wyoming v. Colorado*, 353 U.S. 953 (1957), provides:

> The State of Wyoming, or anyone recognized by her as duly entitled thereto, shall have the right to divert and use all water flowing and remaining in the Laramie river and its tributaries after such diversion and use [as the decree provides for] in Colorado.

The Court practically began its opinion in *Nebraska v. Wyoming* by observing that Colorado "prayed for an equitable apportionment [of the waters of the North Platte] between the three states, *excluding only the tributary waters of the South Platte and Laramie rivers.*" 325 U.S. at 592 (emphasis supplied). The Court then stated:

> The waters of the South Platte and the Laramie were previously apportioned—the former between Colorado and Nebraska by compact . . ., the latter between Colorado and Wyoming by decree. *Wyoming v. Colorado*, 259 U.S. 496. Those apportionments are in no way affected by

ening to dry up the Laramie at its mouth," Neb's Brief, 24 (Oct. 9, 1991), and has done nothing to

---

> the decree in this case.
>
> *Id.* n.1.

Both the context and the use of the definite article "the" before "waters" make clear that the Court meant "all of the waters" of the South Platte and the Laramie rivers. Respecting the construction of the definite article in such a context, *see, e.g., Dooley v. Penland*, 300 S.W. 9, 11 (Tenn. 1927). Moreover, the Court's treatment in tandem of the effects of the decree in *Wyoming v. Colorado* and of the compact between Colorado and Nebraska, demonstrates that the Court regarded the former as having apportioned the waters of the Laramie between Colorado and Wyoming just as completely as the latter apportioned the waters of the South Platte between Colorado and Nebraska. This is confirmed by paragraph XII of the decree which provides:

> This decree shall not affect:
>
> * * *
>
> (d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte;
>
> (e) The apportionment made by the compact between the States of Nebraska and Colorado, apportioning the water of the South Platte River.

325 U.S. at 671.

After concluding that "the water of the Laramie River was equitably distributed by the decision of this Court in the case of *Wyoming v. Colorado*, . . . and that the South Platte River was equitably distributed by compact between Nebraska ratified by the Congress in 1926," Special Master Doherty stated: "This conclusion takes into account the interests of all parties and no redistribution of the waters of those rivers should be undertaken in this suit." Report of Special Master Doherty, 8. He began his recommendations for the decree by stating that they em-

impede the releases which Basin is obligated to make from the Missouri Basin Power Project (Grayrocks) under its agreement with Nebraska, *et al.*, from reaching the North Platte. Nebraska makes no allegation to the contrary.

After the Missouri Basin Power Project was proposed, Nebraska brought suit in the United States District Court for the District of Nebraska against the Rural Electrification Administration (REA) and joined in a suit brought by others against the Corps of Engineers challenging, on environmental grounds, the issuance by the Corps of a 404 permit for the project and the undertaking of the REA to assist with the financing.[11] *Nebraska v. REA*, 12 Env't Rep. Cas.

---

braced the "water of the North Platte River and its tributaries, *except the Laramie River.*" *Id.* at 177 (emphasis supplied).

[11] Professor Tarlock has observed:

> The first major clash between the Endangered Species Act and water allocation arose when Nebraska discovered that downstream irrigators on the Platte River could be better protected under the wing of the endangered whooping crane than by litigating the allocation of the river under interstate compacts and the doctrine of equitable apportionment. Nebraska brought a 'defensive' suit to prevent utility companies from building the Grayrocks Dam on the North Platte River [sic]. By seeking to enjoin the construction of the dam under the Endangered Species Act in order to protect the endangered whooping crane, Nebraska used federal regulatory rights to achieve its principal purpose; protection of the interests of downstream Nebraska agricultural diversions. It proved easier to get water for this purpose than to reopen a 1945 equitable apportionment,

(BNA) 1156 (D. Neb. 1978), *judgment vacated and appeal dismissed*, 594 F.2d 870 (8th Cir. 1979). After protracted negotiations, Nebraska, Basin, and the other parties[12] entered into the settlement agreement of December 4, 1978, which prescribes conditions for water storage and releases in relation to the operation not only of the Missouri Basin Power Project, but of the Corn Creek project as well, should the latter ever be developed. The agreement was submitted to and approved by the United States Court of Appeals for the Tenth Circuit and the obligations it places on Basin were incorporated in a waiver for the project granted by the Endangered Species Committee (popularly referred to as the "God Group") established under the Endangered Species Act. *See* 16 U.S.C. § 1536(e)-(p).

The settlement agreement spells out not only the releases Basin must make from the Missouri Basin Power Project for the benefit of Nebraska, including releases during the non-irrigation season, but also the

---

although Nebraska was able to do this in 1987.

A. D. Tarlock, *Law of Water Rights and Resources* § 9.06[4][c] at p. 9-36 (Clark Boardman Co. 1990).

[12] The other parties to the settlement agreement are: the United States Department of Justice; the Corps of Engineers; the Rural Electrification Administration; the National Wildlife Federation; the Nebraska Wildlife Federation; the National Audubon Society; the Powder River Basin Resource Council; the Laramie River Conservation Council; the City of Lincoln, Nebraska; the Tri-State Generation and Transmission Association; and the Wyoming Municipal Power Agency. The agreement is reprinted in Wyo's Opposition to Neb's Motion for Leave To File Petition, A-24 through A-32 (Dec. 17, 1986).

obligations of Basin in the event the Corn Creek project is developed.[13]

Nebraska has conceded before the special master that the Missouri Basin Power Project has been operated in compliance with the settlement agreement. Neb's Brief in Support of Motion for Partial Summary Judgment, 112 (March 1, 1991). She has absolved the project of any violation of her alleged rights to Laramie water. She says: "It is not the Grayrocks Project itself that Nebraska complains of but rather Wyoming's present and threatened depletions of the minimum releases called for in the Settlement Agreement." *Id.* Apart from Wyoming's holding to her legal position that no water in the Laramie is apportioned to Nebraska by the decree in this case, Nebraska does not now contend, and certainly has made no showing (despite her reference to "present" depletions in the statement quoted immediately above), that Wyoming has done or is threatening to do anything that has resulted or might result in the reduction of the amount of Laramie water reaching the North Platte.[14]

---

[13] The settlement agreement makes provision for the operation of the Corn Creek project, should it ever be built, just as it does for the Missouri Basin Power Project. Moreover, the development of Corn Creek is problematical and the prospect of its ever being built is highly speculative and conjectural. In any event, by no stretch of language can its advent be termed "imminent" or even probable. Corn Creek has no Wyoming water rights, no contract with the Bureau of Reclamation for Glendo water (which would be essential), no 404 permit nor any other required federal permit, and no financing.

[14] Wyoming has shown by uncontroverted evidence that all of the other "projects" mentioned from time to time by Nebraska as potential "threats" to her alleged rights have long since been abandoned or would not deplete North Platte flows. *See* third affidavit of Gordon W. Fassett, Wyoming's brief in opposition to Nebraska's motion to recommend, 23-29 (April 5, 1991). Nebraska has admitted that nothing that has been done in Wyoming since the decree was entered in 1945 has interfered with Laramie flows into the North Platte, except the construction of the Missouri Basin Power Project and the proposal of the Corn Creek project. But with respect to these projects she entered into the settlement agreement providing for the construction and operation of Grayrocks (which she admits has been adhered to) and of Corn Creek, should it ever get beyond the drawing board. Neb's Brief in Support of Motion for Partial Summary Judgment, 109-110 (March 1, 1991).

Nebraska's proposition that the "regimen of the river," and her supposed downstream equities, are threatened by the refurbishment of Tri-State Dam is most curious. She does not allege that the 81,700 acre feet of water, whose passage through Tri-State she says was "a predicate of the Decree," Neb's proposed amended petition, 10 ¶ 35 (Oct. 9, 1991), no longer reaches Tri-State (much less that Wyoming has done anything to interfere with its doing so), but only that, since refurbishment of the dam, this water no longer leaks through it. But the dam is located in Nebraska, is operated by a citizen of Nebraska, and is subject to the control of Nebraska. Manifestly, water reaching Tri-State has to go somewhere in Nebraska. It cannot flow uphill back into Wyoming. Nebraska cannot hold Wyoming responsible for the actions of Nebraska's citizens for whom she here stands in *parens patriae*.

3. The Issues Posed by the Case As It Is Must Be Resolved Before Consideration Is Given To Allowing the Litigation of Others

The Court granted leave to Nebraska to commence this proceeding on the strength of her assurance that

she sought only to enforce the decree as it stands and not to modify it in any way. The Court turned back a previous attempt by Nebraska to renege on this assurance.

The case based on the petition the Court granted Nebraska leave to file has been in litigation now for almost five years. Extensive discovery has been conducted, a massive documentary record has been compiled, the record of the earlier proceedings herein, as well as of those in *Wyoming v. Colorado*, has been exhaustively reviewed, and the issues framed by the petition have been addressed in many rounds of briefing and argument to the special master.

The special master is now preparing a report and recommended decision on a second round of motions for summary judgment, which he will soon file with the Court and which he has indicated will be subject to exceptions and briefing thereon by the parties and *amici*.[15]

---

[15] Denying Ohio's motion for leave to file an amended complaint in a case in a procedural posture analogous to the instant, the Court said:

> Accepted procedures for an ordinary case in this posture would probably lead us to conclude that the motion for leave to file should be granted, and the case would then proceed to trial or judgment on the pleadings. This, however, is not an ordinary case. It is one within the original and exclusive jurisdiction of the Court. Procedures governing the exercise of our original jurisdiction are not invariably governed by common-law precedent or by current rules of civil procedure. Under our rules, the requirement of a motion for leave to file a complaint, and the requirement of a brief in opposition, permit and enable us to dispose of matters at a preliminary stage. Our object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented. To this end, where feasible, we dispose of issues that would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear.

Ohio v. Kentucky, 410 U.S. 641, 644 (1973) (citations omitted).

The issues that have been presented to the special master by the motions for summary judgment fall generally into four groups, tracking the allegations of Nebraska's petition, which are styled: 1) Laramie issues; 2) East-of-Tri-State issues; 3) Deer Creek issues; and 4) Inland Lakes issues.

Most, if not all, of these issues are now ripe for disposition and should be finally determinable by the Court upon review of the special master's report and recommendations and exceptions thereto. Although Basin submits that Nebraska's instant motion for leave to file an amended petition should be denied on the basis of her failure to make such a showing of injury or damage as the Court requires to permit one state to sue another for an apportionment of an interstate stream or to alter an apportionment previously made, any other action on Nebraska's motion, including its referral to the special master should the Court be disposed to do so, ought to be stayed pending disposition of the motions for summary judgment.

Basin submits that the issues posed by the case as it now stands should be resolved before considering the need for, or appropriateness of, permitting others to be litigated. The respective rights of the parties

under the decree as it stands are issues in hot dispute, whose resolution, Nebraska acknowledges, "will have a significant affect on the non-irrigation season flows." Neb's Brief, 21 (Oct. 9, 1991). These issues are on the threshold of authoritative resolution in this case as now structured. Until the present rights of the parties are authoritatively determined, it would make little sense to commission a proceeding to consider their alteration.

Conclusion

For the foregoing reasons, Basin submits that Nebraska's motion for leave to file an amended petition must be denied.

Respectfully submitted,

EDWARD WEINBERG
Counsel of Record
RICHMOND F. ALLAN
DUNCAN, WEINBERG, MILLER & PEMBROKE, P.C.
1615 M Street, N.W.
Suite 800
Washington, DC 20036
(202) 467-6370

Of Counsel:

CLAIRE OLSON
Assistant General Counsel
BASIN ELECTRIC POWER COOPERATIVE
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

MICHAEL J. HINMAN
General Counsel
BASIN ELECTRIC POWER COOPERATIVE
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

November 12, 1991